

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PATRICIA STORM, as the wife in  
the marital community and as  
Personal Representative for  
the Estate of John Storm, who  
was husband in the marital  
community,

Plaintiff,

v.

CITY OF PASCO, a municipal  
corporation, et al.,

Defendants.

NO. CV-10-5093-EFS

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT,  
DISMISSING CASE, AND CLOSING  
FILE**

This matter comes before the Court on Defendants' Motion for Summary Judgment, ECF No. [40](#), and Plaintiff Patricia Storm's Cross Motion for Partial Summary Judgment on Probable Cause, ECF No. [55](#). A hearing on the parties' motions was held on July 17, 2012, in Richland. After reviewing the record in this matter and relevant authority, and hearing from counsel, the Court was fully informed. This Order serves to memorialize and supplement the Court's oral rulings denying Plaintiff's motion, granting Defendants' motion, and dismissing this matter.

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1 **I. Background<sup>1</sup>**

2 **A. Troy Fuller**

3 The story behind this lawsuit involves parents' love and generosity,  
4 a son's illness, and the criminal endeavors of a man who is not a party:  
5 Troy Fuller. In August 2009, Fuller embarked on a crime spree in the  
6 Tri-Cities area that rapidly escalated from its humble beginning in petty  
7 forgery to a dramatic conclusion involving a homemade explosive device  
8 and a dramatic SWAT team raid.

9 On August 15, 2009, Fuller passed a forged check at the Fiesta Foods  
10 grocery store in Pasco, Washington. A witness to the incident identified  
11 Fuller as the culprit and provided officers with the description of the  
12 vehicle Fuller had used to flee the store, a white Ford pickup truck with  
13 Washington license plate number B16238L. Just three days later, on  
14 August 18, 2009, Fuller entered the Kennewick, Washington branch of Bank  
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16 <sup>1</sup> When considering this motion and creating this Background  
17 section, the Court does not weigh the evidence or assess credibility.  
18 Instead, the Court takes as true all undisputed facts, and views all  
19 evidence and draws all justifiable inferences therefrom in favor of the  
20 party opposing each motion. See *Anderson v. Liberty Lobby, Inc.*, 477  
21 U.S. 242, 255 (1986). However, the Court did not accept as true  
22 assertions made by the opposing party if they were flatly contradicted  
23 by the record. See *Scott v. Harris*, 550 U.S. 372, 380 (2007). Disputed  
24 facts and quotations are set forth with citation to the record, while  
25 undisputed facts are not.  
26

1 of the West and handed the clerk a deposit slip with the word "robbery"  
2 written on it, escaping the scene with eight hundred dollars. Later that  
3 same day, Fuller overdosed on heroin at the Richland, Washington home of  
4 brothers Donald and Steven Semmern. A Richland police officer and a  
5 Richland emergency services ambulance responded to the call, but it is  
6 unclear whether Fuller was hospitalized or arrested. On August 21, 2009,  
7 Fuller robbed the Kennewick branch of U.S. Bank, this time making off  
8 with one thousand dollars.

9 On the morning of August 25, 2009, Fuller entered a Rite Aid  
10 drugstore in Richland with a four-inch plastic device strapped to his  
11 stomach and a black remote control in his hand. Fuller told the store  
12 manager that he was carrying a bomb and demanded money. The manager  
13 complied and gave Fuller seven hundred and ninety dollars, which Fuller  
14 placed into a small duffle bag with a Seattle Mariners logo. Richland  
15 Police Officer Christopher Lee responded to the scene and attempted to  
16 pursue Fuller on foot, but Fuller was nowhere to be found; based on the  
17 speed with which Fuller disappeared, Officer Lee concluded that he had  
18 fled using a vehicle located within a short distance from the store. A  
19 store employee identified Fuller as the culprit from a photo montage, and  
20 a cell phone "ping" placed Fuller in the area surrounding the Rite Aid  
21 roughly one half-hour prior to the robbery.

22 In an effort to find Fuller, Officer Lee and Richland Police Officer  
23 Jarin Whitby went to the Tahitian Inn in Pasco, an inexpensive motel  
24 where Fuller was known to stay, but the clerk indicated that Fuller was  
25 not a guest at the inn. Officers Lee and Whitby also checked other  
26 motels and homes that Fuller was known to frequent, but to no avail.

1 Officer Whitby and Richland Police Officer Jeffrey Bickford then went to  
2 the Semmerns' residence, where Fuller had overdosed one week earlier, to  
3 determine whether the Semmerns had any information regarding Fuller's  
4 whereabouts. Officer Whitby eventually spoke to Steven Semmern on the  
5 telephone, who informed him that he had "recently" picked up Fuller from  
6 a female's apartment on Sylvester Street in Pasco. Semmern identified  
7 the woman as "Stacy," stated that the apartment number was A-3, and  
8 described the area and the apartment building. Officer Whitby relayed  
9 this information to Officer Lee, who entered the information into the  
10 "ILEADS" computer database, which showed that a woman named Stacy Lane  
11 lived in Apartment A-3 at 2313 West Sylvester Street in Pasco. The  
12 ILEADS report also showed that Ms. Lane was a suspect with Troy Fuller  
13 and Andy Torres in the Pasco Fiesta Foods forgery one week earlier; Mr.  
14 Torres was the registered owner of the white pickup truck that had been  
15 used to leave the scene.

16 **B. Apartment A-3**

17 Plaintiff Patricia Storm and her now-deceased husband John Storm  
18 purchased apartment A-3 at 2313 W. Sylvester St. (hereinafter "the  
19 Apartment") in 1990. The Storms never resided in the Apartment, but  
20 generously permitted their adult son Jerry Storm to live there from 1990  
21 to 2009. In August 2009, Jerry Storm was living in the Apartment with  
22 Ms. Lane, who was his girlfriend. Mr. Storm and Ms. Lane were not neat  
23 housekeepers, and damaged the Condominium in various ways including  
24 staining the walls with cigarette smoke, removing the baseboard and part  
25 of the floor, allowing mold to grow in the bathroom, and nailing the  
26 kitchen cabinets shut.

1 For a period during the month of August 2009, Mr. Storm permitted  
2 Mr. Torres to stay in the Apartment's guest bedroom. At some point  
3 several days before August 25, 2009, Mr. Torres invited Troy Fuller to  
4 the Apartment, where Fuller stayed overnight. Ms. Lane told Mr. Storm  
5 that she did not want Fuller to stay at the Apartment, so Mr. Storm  
6 brought Fuller to the Tahitian Inn and booked him a room in Mr. Storm's  
7 name. The Tahitian Inn is located at 2724 West Lewis Street in Pasco,  
8 roughly six city blocks from the Apartment.

9 **C. SWAT Team Raid**

10 Meanwhile, based on the ILEADS information communicated to them,  
11 Pasco Police Department patrol officers went to the building where the  
12 Apartment was located and observed a white Ford pickup truck parked  
13 outside. The pickup truck bore Washington license plate B16238L, the  
14 same plate that had been observed on the white pickup truck connected  
15 with the Fiesta Foods forgery. The officers surrounded the home and  
16 detected signs that someone was inside: two officers noticed someone move  
17 a curtain and look out a window, and from the back of the Apartment,  
18 Pasco police officer Michael Nelson noticed the curtain behind the glass  
19 sliding door move suddenly, as if someone had been surreptitiously  
20 observing the assembling officers. This information, as well as  
21 information about the pickup truck, was conveyed to Officer Lee, who  
22 drove to the scene after notifying Tri-City Regional SWAT Team member  
23 Wayne Dubois that the team might be needed in Pasco that evening. Officer  
24 Lee also called the Kennewick Police Department and asked them to respond  
25 to the Apartment.

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1 When Officer Lee arrived at the scene, Kennewick Police detective  
2 Mike Hamilton and Sergeant Jack Simington informed him that they had  
3 received cell phone "pings" from Troy Fuller's cell phone in the vicinity  
4 of 28th Avenue and Sylvester Street in Pasco, roughly four blocks from  
5 the Apartment. Officers went to that intersection, but found no trace  
6 of Fuller.

7 At roughly 6:45 p.m., officers used a public address system to  
8 demand that any occupants of the Apartment exit the home. Several  
9 minutes later, Andy Torres exited the Apartment and was arrested on an  
10 unrelated warrant. Mr. Torres told the officers that he was the only  
11 person in the apartment, but also denied that he had moved the curtain.

12 At 6:49 p.m., Officer Lee called Franklin County Superior Court  
13 Judge Craig Matheson to request a search warrant for the Apartment.  
14 During that conversation, Judge Matheson put Officer Lee under oath and  
15 Officer Lee briefly described his professional experience and the  
16 circumstances surrounding Fuller's recent crimes. Officer Lee then  
17 discussed how the white pickup truck associated with the Fiesta Foods  
18 forgery was parked outside the Apartment, and how Steven Semmern had told  
19 Officer Whitby that "apartment A3 was the residence where he had picked  
20 up Fuller in the past." Lee Aff., ECF No. 44-1 at 3. Finally, Officer  
21 Lee discussed Torres' exit from the residence and his claim that no one  
22 else was present inside. Officer Lee asked for permission to search the  
23 Apartment to look for the specific denominations of currency stolen from  
24 the banks and the Rite Aid, the Seattle Mariners duffle bag, specified  
25 articles of clothing, and the putative explosive device and remote  
26 control Fuller brandished during the Rite Aid robbery. Judge Matheson

1 telephonically authorized the search warrant, stating that he was relying  
2 upon Officer Lee's telephonic affidavit as well as other affidavits  
3 relating to Fuller that he had received in the previous days.

4 Mr. Storm and Ms. Lane returned home during this time period but,  
5 seeing the officers assembling outside the Apartment, detoured to the  
6 home of Ms. Lane's mother. Ms. Lane called the Pasco Police Department  
7 to learn why the police were outside of her home, and at 7:24 p.m., she  
8 was connected with Pasco Police Officer Bradford Gregory, who was present  
9 at the scene.<sup>2</sup> Officer Gregory was familiar with Ms. Lane from prior  
10 criminal activity, but told her that he was only interested in  
11 apprehending Troy Fuller. Ms. Lane first stated that no one was at the  
12 Apartment, but when confronted with the fact that Mr. Torres had already  
13 exited the Apartment, conceded that "her friend Andy" was there. Gregory  
14 Decl., ECF No. [46](#) ¶ 11.

15 At 7:15 p.m., members of the Tri-City Regional SWAT Team arrived  
16 outside the Apartment and replaced the Pasco officers who had previously  
17 surrounded the home. At 8:30 p.m., the SWAT team evacuated neighboring  
18 apartments for the safety of the neighbors. At 8:40 p.m., the SWAT  
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20 <sup>2</sup> Officer Lee states that Officer Gregory's conversation with Ms.  
21 Lane "likely occurred . . . before my conversation with Judge Matheson,"  
22 but states that he was not aware the conversation had occurred at the  
23 time he spoke with Judge Matheson. Lee Decl., ECF No. [44](#) ¶ 37. Officer  
24 Gregory, however, states that he spoke with Ms. Lane at 7:24 p.m., some  
25 time after Officer Lee's 6:49-to-6:58 p.m. call to Judge Matheson.  
26 Gregory Decl., ECF No. [46](#) ¶ 7; see also Lee Aff., ECF No. 44-[1](#) at 1, 4.

1 team's trained hostage negotiator used a public address system to urge  
2 the Apartment's occupants to exit the Apartment peacefully. At 8:58  
3 p.m., the SWAT team deployed two "flashbangs"<sup>3</sup> on the front and back side  
4 of the Apartment. At 8:59 p.m., the SWAT team broke two windows on the  
5 Apartment's upper level and launched tear gas and pepper spray canisters  
6 into the Apartment. At 9:00 p.m., officers made another public address  
7 announcement. At 9:30 p.m., the rear sliding door to the apartment was  
8 shot and tear gas and pepper spray canisters were launched into the  
9 Apartment.

10 At 10:04 p.m., SWAT team members entered the Apartment and moved  
11 from room to room. Because they were searching for a man they believed  
12 to possess an explosive device, the SWAT team members detonated a  
13 "Stinger"<sup>4</sup> grenade in each room before they entered it. Finding no one  
14 on the first floor, the SWAT team proceeded upstairs, again detonating  
15 a Stinger before breaching each room. The last room the SWAT team  
16 reached was a locked bedroom, which team members kicked open. Fuller was  
17 nowhere to be found.

18 The officers then proceeded to Ms. Lane's mother's home to discuss  
19 the incident with Mr. Storm and Ms. Lane. Mrs. Storm argues that the  
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21 <sup>3</sup> A "flashbang" is an explosive device that creates a bright flash  
22 of light and loud noise designed to disorient and intimidate its subject.

23 <sup>4</sup> A "Stinger" is another form of non-lethal explosive device that  
24 releases a fusillade of small rubber pellets along with a bright flash  
25 of light and a loud noise. Some "Stinger" models also include chemical  
26 agents such as tear gas or pepper spray.



1 officers searched Mr. Lane's mother's home without authority, but does  
2 not elaborate on the point and appears to acknowledge that she would not  
3 have standing to bring a claim based on that search.

4 **D. Aftermath and Legal Action**

5 The damage to the Apartment as a result of the police raid was  
6 considerable. Numerous windows were broken, the noxious smell of pepper  
7 spray and tear gas lingered throughout the home, and the Apartment's  
8 floors, ceilings, walls, and fixtures were damaged by the SWAT team's  
9 Stinger grenades. Mrs. Storm hired Northwest Restoration, Inc. to repair  
10 the Apartment, ultimately spending over \$50,000.00. Because of the  
11 damage Mr. Storm and Ms. Lane had previously caused to the Apartment,  
12 however, Defendants dispute that the entirety of these repairs were  
13 necessitated by the SWAT team's August 25, 2009 entry.

14 Mrs. Storm and her late husband filed claim forms with the Cities  
15 of Pasco and Richland and with Benton County pursuant to RCW 4.96.020.  
16 Those claims were presumably denied, and the Storms filed a Complaint for  
17 Damages in Benton County Superior Court on June 23, 2010. ECF No. 1.  
18 Defendants removed the lawsuit to this Court on August 6, 2010, id., and  
19 on August 9, 2011, Mrs. Storm filed an Amended Complaint on behalf of  
20 herself and as Personal Representative for the Estate of John Storm, who  
21 had since passed away. ECF No. 24. The Amended Complaint names as  
22 Defendants the City of Pasco, the City of Richland, and Benton County,  
23 (hereinafter "Municipal Defendants"), as well as a number of named and  
24 unnamed officers from the Richland and Pasco Police Departments and the  
25 Tri-City Regional SWAT Team (hereinafter "Individual Defendants"). On  
26 April 2, 2012, Defendants filed the instant Motion for Summary Judgment,

1 and on April 23, 2012, Mrs. Storm filed the instant Cross Motion for  
2 Partial Summary Judgment on Probable Cause in riposte.

## 3 **II. Discussion**

### 4 **A. Legal Standard**

5 Summary judgment is appropriate if "the movant shows that there is  
6 no genuine dispute as to any material fact and the movant is entitled to  
7 judgment as a matter of law." Fed. R. Civ. P. 56(a). Once a party has  
8 moved for summary judgment, the opposing party must point to specific  
9 facts establishing that there is a genuine issue for trial. *Celotex*  
10 *Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails  
11 to make such a showing for any of the elements essential to its case for  
12 which it bears the burden of proof, the trial court should grant the  
13 summary judgment motion. *Id.* at 322. "When the moving party has carried  
14 its burden of [showing that it is entitled to judgment as a matter of  
15 law], its opponent must do more than show that there is some metaphysical  
16 doubt as to material facts. In the language of [Rule 56], the nonmoving  
17 party must come forward with 'specific facts showing that there is a  
18 *genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v. Zenith Radio*  
19 *Corp.*, 475 U.S. 574, 586-87 (1986) (internal citation omitted) (emphasis  
20 in original).

21 When considering a motion for summary judgment, the Court does not  
22 weigh the evidence or assess credibility; instead, "the evidence of the  
23 non-movant is to be believed, and all justifiable inferences are to be  
24 drawn in his favor." *Anderson*, 477 U.S. at 255. This does not mean that  
25 the Court accepts as true assertions made by the non-moving party that  
26 are flatly contradicted by the record. *See Scott*, 550 U.S. at 380.

1           **B.    Analysis**

2           Mrs. Storm's Amended Complaint asserts claims for violation of her  
3 federal and state constitutional "rights to privacy," as well as state  
4 law claims for outrage, conversion, "strict liability," negligence,  
5 wrongful injury to property pursuant to RCW 4.24.630, and trespass. On  
6 April 6, 2012, Mrs. Storm filed a Notice of To Be Adjudicated Claims in  
7 which she states that she abandons all claims except her constitutional,  
8 wrongful injury to property, negligence, and trespass claims. ECF No.  
9 [51](#).

10           **i.    § 1983 Claim**

11           Mrs. Storm asserts a claim for violation of her Fourth Amendment  
12 rights to be free from unreasonable searches and from excessive force  
13 under 42 U.S.C. § 1983. Section 1983 provides that

14           [el]very person who, under color of any statute, ordinance,  
15 regulation, custom, or usage, of any State or Territory or  
16 the District of Columbia, subjects, or causes to be  
17 subjected, any citizen of the United States or other person  
18 within the jurisdiction thereof to the deprivation of any  
rights, privileges, or immunities secured by the Constitution  
and law, shall be liable to the party injured in an action at  
law, suit in equity, or other proper proceeding for redress.

. . .

19 42 U.S.C. § 1983. Because Mrs. Storm's § 1983 claim raises different  
20 issues with regard to the Municipal Defendants and the Individual  
21 Defendants, the Court analyzes those classes of Defendants separately.

22           **a.    Municipal Defendants**

23           As it relates to the City of Richland, the City of Pasco, and Benton  
24 County, Mrs. Storm may only succeed on her illegal search and excessive  
25 force claims if she has properly asserted a claim under *Monell v.*  
26 *Department of Social Services*, 436 U.S. 658 (1978), because counties and

1 municipalities cannot be liable under § 1983 on a *respondeat superior*  
2 theory. See *Monell*, 436 U.S. at 690-91. Instead, to succeed on a § 1983  
3 claim against a county or local government entity, a plaintiff must show  
4 that their rights were violated as a result of an official government  
5 policy or a longstanding practice or custom that constitutes the standard  
6 operating procedure of the entity.<sup>5</sup> *Id.*; see also *Trevino v. Gates*, 99  
7 F.3d 911, 918 (9th Cir. 1996). "Liability for improper custom may not  
8 be predicated on isolated or sporadic incidents; it must be founded upon  
9 practices of sufficient duration, frequency and consistency that the  
10 conduct has become a traditional method of carrying out policy."  
11 *Trevino*, 99 F.3d at 918. Furthermore, the policy or custom implicated  
12 must be the "moving force" behind the injury alleged. *Bd. of Cnty.*  
13 *Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1995). When a *Monell*  
14 claim is predicated on a failure to properly train police officers, the  
15 plaintiff must show that the failure to train amounts to "deliberate  
16 indifference" to the constitutional rights of people with whom the  
17 municipality's officers may come into contact. *Collins v. City of Harker*  
18 *Heights, Tex.*, 503 U.S. 115, 124 (1992); *City of Canton, Ohio v. Harris*,  
19 489 U.S. 378, 388-89 (1989).

20 Here, Mrs. Storm has not presented any direct evidence showing that  
21 a municipal policy or custom caused the alleged violations of her  
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23 <sup>5</sup> Municipalities may also be liable under § 1983 if a violation is  
24 committed or subsequently ratified by a municipal official with "final  
25 policy-making authority." *Gillette v. Delmore*, 979 F.2d 1342, 1346-47  
26 (9th Cir. 1992).

1 constitutional rights. In support of her *Monell* claim, Mrs. Storm argues  
2 that the officers conducted a second unconstitutional search on the night  
3 of August 25, 2009, when they searched the home of Ms. Lane's mother.  
4 Mrs. Storm also points to the fact that a separate and unrelated claim  
5 has been filed against the Cities of Pasco, Kennewick, and Richland  
6 alleging that police officers forcefully entered a home without  
7 authorization. See Armitage Decl., ECF No. [59](#), Ex. J (complaint for  
8 damages in *Travis v. City of Pasco, et al.*, Franklin Cnty. Sup. Ct. Cause  
9 No. 11-2-511947). However, even assuming that the Defendant officers did  
10 unconstitutionally search Ms. Lane's mother's home, that fact would not  
11 constitute a practice of "sufficient duration, frequency and consistency"  
12 to establish a municipal policy or custom. And the mere fact that  
13 another civil litigant has filed a lawsuit against the Municipal  
14 Defendants and their sister city in no way proves that the allegations  
15 in that litigant's complaint are true or that, if they were proven, they  
16 would demonstrate a municipal policy or custom. Finally, Mrs. Storm's  
17 argument that "the egregious nature of Defendants' conduct could lead a  
18 reasonable juror to conclude that officer training is and was inadequate"  
19 simply misses the mark because it does not support an inference that the  
20 inadequacy of the officers' training amounted to "deliberate  
21 indifference" to the constitutional rights of those who the officers came  
22 in contact with.

23 Accordingly, the Court finds that Mrs. Storm has presented no  
24 evidence in support of her § 1983 claims against the Municipal  
25 Defendants, and grants Defendants' motion in this regard.

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1                   **b. Individual Defendants**

2           With regard to the Individual Defendants in this matter, the Court  
3 analyzes Mrs. Storm's Fourth Amendment illegal search claim and Fourth  
4 Amendment excessive force claims separately.

5                   **I. Illegal Search Claim**

6           Mrs. Storm's Amended Complaint asserts that the Individual  
7 Defendants violated her right to be free from unreasonable searches  
8 because the warrant upon which Defendants justified their entry of the  
9 Apartment was not based on probable cause. Defendants respond that the  
10 Individual Defendants are entitled to qualified immunity, and argue that  
11 the warrant was proper.

12                   **A. Qualified Immunity**

13           The doctrine of qualified immunity protects government officials  
14 "from liability for civil damages insofar as their conduct does not  
15 violate clearly established statutory or constitutional rights of which  
16 a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S.  
17 800, 818 (1982). District courts evaluating a claim of qualified  
18 immunity must analyze two questions: one, whether "the facts alleged show  
19 the officer's conduct violated a constitutional right," and two, whether  
20 the constitutional right at issue was "clearly established" at the time  
21 of the alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).  
22 District Courts are "permitted to exercise their sound discretion in  
23 deciding which of the two prongs of the qualified immunity analysis  
24 should be addressed first in light of the circumstances in the particular  
25 case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "[W]hether  
26 an official protected by qualified immunity may be held personally liable

1 for an allegedly unlawful action generally turns on the 'objective legal  
2 reasonableness' of the action, assessed in light of the legal rules that  
3 were 'clearly established' at the time it was taken." *Anderson v.*  
4 *Creighton*, 483 U.S. 635, 639 (1987) (internal citation omitted).

5 Where the alleged Fourth Amendment violation involves a search or  
6 seizure pursuant to a warrant, the fact that a neutral magistrate has  
7 issued a warrant is the "clearest indication" that the officers acted in  
8 an objectively reasonable manner. *Messerschmidt v. Millender*, 132 S. Ct.  
9 1235, 1245 (2012) (citing *United States v. Leon*, 468 U.S. 897, 922-23  
10 (1984)). A qualified immunity defense will be lost, however, when "it  
11 is obvious that no reasonable competent officer would have concluded that  
12 a warrant should issue," for instance if the warrant was "based on an  
13 affidavit so lacking in indicia of probable cause as to render official  
14 belief in its existence entirely unreasonable." *Id.* (citing *Malley v.*  
15 *Briggs*, 475 U.S. 335, 341 (1986); *Leon*, 468 U.S. at 923). "[I]n the  
16 ordinary case, an officer cannot be expected to question the magistrate's  
17 probable-cause determination because it is the magistrate's  
18 responsibility to determine whether the officer's allegations establish  
19 probable cause and, if so, to issue a warrant comporting in form with the  
20 requirements of the Fourth Amendment." *Id.* (quoting *Leon*, 468 U.S. at  
21 921) (internal quotation omitted).

22 Here, it is clear that the Individual Defendants who relied on the  
23 search warrant obtained by Officer Lee acted in an objectively reasonable  
24 manner. The search warrant, ECF No. 44-[1](#) at 1-2, specifies the date, the  
25 premises to be searched, and the items to be seized, and the supporting  
26 affidavit is not so lacking in indicia of probable cause as to render the

1 Individual Defendants' reliance upon it unreasonable. Accordingly, the  
2 Court finds that all of the Individual Defendants except Officer Lee are  
3 entitled to qualified immunity.

4 **B. Probable Cause**

5 Officer Lee, however, is not entitled to qualified immunity because  
6 he provided the affidavit upon which Judge Matheson relied in issuing the  
7 warrant, an affidavit that Mrs. Storm alleges was deficient.  
8 Specifically, Mrs. Storm alleges that the facts in the warrant were  
9 stale, that Officer Lee omitted material facts from the affidavit, and  
10 that the affidavit lacks any facts to demonstrate that the information  
11 provided by Steven Semmern was reliable. Accordingly, the Court  
12 evaluates whether Officer Lee's affidavit supported the issuance of a  
13 warrant.

14 "Probable cause exists when 'there is a fair probability that  
15 contraband or evidence of a crime will be found in a particular place.'" *Millender v. Cnty. of Los Angeles*, 620 F.3d 1016, 1024 (9th Cir. 2010)  
16 (quoting *United States v. Grubbs*, 547 U.S. 90, 95 (2006)). All  
17 information necessary to show probable cause for the issuance of a search  
18 warrant must be contained within the "four corners" of an affidavit given  
19 under oath. *United States v. Gourde*, 440 F.3d 1065, 1067 (quoting *United*  
20 *States v. Anderson*, 453 F.2d 174, 175 (9th Cir. 1971)). Courts reviewing  
21 the propriety of a warrant are thus limited to the facts submitted in the  
22 petitioning officer's affidavit. See *United States v. Luong*, 470 F.3d  
23 898, 904-905 (9th Cir. 2006) (citing *Gourde*, 440 F.3d at 1067). "[A]  
24 magistrate's determination of probable cause should be paid great  
25  
26



1 deference by reviewing courts." *United States v. Krupa*, 633 F.3d 1148,  
2 1151 (9th Cir. 2011) (citation omitted).

3 Mrs. Storm argues that the information in Officer Lee's affidavit  
4 was stale because it did not identify when Mr. Semmern picked Fuller up  
5 from the apartment. An affidavit supporting a search warrant must be  
6 based on facts "so closely related to the time of the issue of the  
7 warrant as to justify a finding of probable cause at that time." *United*  
8 *States v. Lacy*, 119 F.3d 742, 745 (9th Cir. 1997) (quoting *Durham v.*  
9 *United States*, 403 F.2d 190, 193 (9th Cir. 1968)). Courts evaluate  
10 staleness "in light of the particular facts of the case and the nature  
11 of the criminal activity and property sought," and will not find a  
12 warrant to be stale if there is "sufficient basis to believe, based on  
13 a continuing pattern or other good reasons, that the items to be seized  
14 are still on the premises." *Id.* at 745-46 (citation omitted). Under  
15 this standard, the information in Officer Lee's affidavit was not stale.  
16 While the affidavit does not specify exactly when Mr. Semmern picked  
17 Fuller up from the Apartment, the affidavit is rife with current,  
18 specific information supporting the conclusion that the items to be  
19 searched were at the Apartment: Fuller was believed to have robbed two  
20 banks wearing the specified clothing just seven days earlier; Fuller was  
21 believed to have robbed the Rite Aid with the specified explosive device  
22 *that morning*; and Mr. Torres' statement just minutes before Officer Lee's  
23 testimony supports the inference that a person intent on avoiding  
24 detection was still in the Apartment.<sup>6</sup> These recent facts, coupled with

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25 <sup>6</sup> Mr. Torres' twin statements that no one else was in the Apartment  
26 and that he did not move the curtain are contradictory, such that one

1 the fact that the white pickup truck Fuller had used as a getaway vehicle  
2 just ten days before was parked outside of the Apartment, support a  
3 reasonable belief that Fuller was in the Apartment with the items  
4 specified in the search warrant. Officer Lee's affidavit was not stale.

5 Mrs. Storm also argues that the warrant was defective because  
6 Officer Lee omitted material facts in his affidavit, namely, the facts  
7 that 1) Ms. Lane told Officer Gregory no one was in the Apartment and 2)  
8 a cell phone "ping" placed Fuller in a different location. A search  
9 warrant is invalid if the underlying affidavit "contained  
10 misrepresentations or omissions material to the finding of probable  
11 cause," and the plaintiff makes a "substantial showing that the  
12 misrepresentations or omissions were made intentionally or with reckless  
13 disregard for the truth." *Bravo v. City of Santa Maria*, 665 F.3d 1076,  
14 1083 (9th Cir. 2011) (citing *Ewing v. City of Stockton*, 588 F.3d 1218,  
15 1223-24 (9th Cir. 2009)) (internal quotation omitted).

16 Here, the facts omitted by Officer Lee were neither material to the  
17 search warrant nor omitted intentionally or with reckless disregard for  
18 the truth. It is unclear whether Officer Lee was even aware of Ms.  
19 Lane's call at the time that he called Judge Matheson, but even if he  
20 were, the fact that Ms. Lane had lied about whether Mr. Torres was in the

21 \_\_\_\_\_  
22 must be false: either Torres was alone in the Apartment and moved the  
23 curtain, or he did not move the curtain and someone else did. The fact  
24 that Torres would lie with no apparent personal motive supports the  
25 reasonable inference that he was attempting to protect someone inside the  
26 Apartment.

1 apartment just moments before renders her statement so unreliable as to  
2 be immaterial. And the Court rejects out of hand Mrs. Storm's argument  
3 that the cell phone ping "placed" Fuller in any particular place; the  
4 precision of network-based cellular phone location data depends on a  
5 number of factors including the density of cell towers in the related  
6 area, and the technique has an apparent maximum accuracy of 100 to 300  
7 meters. See *In re: App. of the United States for an Order for Prospec.*  
8 *Cell Site Location Info. on a Certain Cellular Tel.*, 460 F.Supp.2d 448,  
9 451 n. 3 (S.D. N.Y. 2006) (discussing network-based "triangulation" of  
10 cellular phones); see also Michael Cherry, et al., *Cell Tower Junk*  
11 *Science*, 95 JUDICATURE 151 (Jan.-Feb. 2012) (criticizing use of network-  
12 based cellular location data in criminal prosecutions). Because the fact  
13 that the ping "placed" Fuller roughly four blocks from the Apartment at  
14 best only indicated that Fuller was in the vicinity, the Court finds that  
15 this fact was immaterial to the issue of probable cause; if anything, the  
16 ping actually supported the officers' inference that Fuller was in the  
17 Apartment. Furthermore, even if either of the two above-mentioned facts  
18 were material to the issue of probable cause, Mrs. Storm has presented  
19 no evidence tending to demonstrate that Officer Lee's omissions were made  
20 intentionally or in reckless disregard of the truth. Rather, in light  
21 of the fact that Officer Lee made his affidavit in the midst of an  
22 assembling SWAT team outside of an apartment complex where a man was  
23 believed to be hiding out with a bomb, it is entirely reasonable to  
24 conclude that Officer Lee's omissions were inadvertent. Accordingly, the  
25 Court rejects Mrs. Storm's argument that the warrant was invalid because  
26 Officer Lee omitted material facts in his affidavit.

1 Finally, Mrs. Storm argues that the affidavit is lacking because it  
2 did not include information regarding Mr. Semmern's reliability. When  
3 considering whether an informant's tip is sufficient to support a finding  
4 of probable cause, federal courts employ a "'totality-of-the-  
5 circumstances approach' that takes into consideration the informant's  
6 'veracity' or 'reliability' and his 'basis of knowledge.'" *United States*  
7 *v. Rowland*, 464 F.3d 899, 907 (9th Cir. 2006) (quoting *Illinois v. Gates*,  
8 462 U.S. 213, 238 (1983)). Courts generally consider four factors in  
9 determining the reliability of an informant's tip: whether the informant  
10 is known or anonymous, whether the informant has a "proven track record  
11 of reliability," whether the informant reveals the basis of his  
12 knowledge, and whether the tip provides "detailed predictive information  
13 about future events that is corroborated by police observation." *Id.*  
14 (citation omitted). Here, the Court finds that Officer Lee's discussion  
15 of the information provided by Mr. Semmern was sufficiently reliable  
16 under the totality of the circumstances. Mr. Semmern provided his name  
17 with no request for anonymity, meaning that his "reputation [could] be  
18 assessed and [he could] be held responsible if [his] allegations turned  
19 out to be fabricated." *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (citing  
20 *Adams v. Williams*, 407 U.S. 143, 146-47 (1972)). Additionally, the  
21 affidavit describes how Mr. Semmern's information regarding both the  
22 number of the apartment and Ms. Lane's name was corroborated by the  
23 ILEADS database. Finally, based on the mere fact that Fuller's getaway  
24 vehicle was parked in front of the Apartment, the warrant would be  
25 sufficient to support a finding of probable cause even without the  
26 information provided by Mr. Semmern. Accordingly, the Court rejects Mrs.

1 Storm's argument that the warrant did not contain sufficient information  
2 to detail Mr. Semmern's reliability.

3 For the reasons discussed above, the Court finds that Officer Lee's  
4 affidavit was sufficient to establish probable cause for the warrant to  
5 issue, and grants Defendants' motion with regard to Officer Lee as well.

## 6 **II. Excessive Force Claim**

7 Mrs. Storm's excessive force claim is analyzed under the Fourth  
8 Amendment's prohibition of unreasonable searches and seizures. Whether  
9 the Individual Defendants used excessive force in searching the Apartment  
10 depends on "whether the officers' actions are objectively reasonable in  
11 light of the facts and circumstances confronting them." *Graham v.*  
12 *Connor*, 490 U.S. 386, 394 (1989). This inquiry requires balancing the  
13 nature and quality of the intrusion on an individuals' Fourth Amendment  
14 interests against the countervailing governmental interests at stake.  
15 *United States v. Ankeny*, 502 F.3d 829, 836 (9th Cir. 2007) (quoting  
16 *Graham*, 490 U.S. at 396). Courts in the Ninth Circuit analyze the  
17 government's interest in the use of force by evaluating three non-  
18 exclusive factors, "the severity of the crime at issue, whether the  
19 suspect poses an immediate threat to the safety of the officers or  
20 others, and whether he is actively resisting arrest or attempting to  
21 evade arrest by flight." *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th  
22 Cir. 2010) (quoting *Graham*, 490 U.S. at 396).

23 Here, the Individual Defendants' use of force was clearly reasonable  
24 under the totality of the circumstances. First, while the intrusion on  
25 Mrs. Storm's Fourth Amendment interests was substantial and caused her  
26 to incur significant repair costs, it was an intrusion on a property

1 interest that did not involve bodily injury or an otherwise wrongful  
2 intrusion on an individual's liberty interest. On the other side of the  
3 scale, the government's interest in the use of force during the search  
4 warrant's execution was enormous. Fuller was reasonably believed to be  
5 in possession of an explosive device, posing a serious and immediate  
6 threat to the safety of the SWAT team as well as the residents of the  
7 neighborhood who had gathered in the vicinity, see Roske Decl., ECF No.  
8 [47](#) ¶ 31, which is the "most important factor under *Graham*." *Bryan*, 630  
9 F.3d at 826 (quoting *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir.  
10 2005) (en banc)). Fuller was also being investigated for the serious  
11 crime of armed robbery, and under the officers' reasonable belief that  
12 Fuller was in the apartment, his non-responsiveness to the officers'  
13 public address announcements indicated he was attempting to evade arrest.  
14 Finally, Officers Dubois and Law credibly state in their declarations  
15 that it was necessary for the SWAT team to use flashbangs, chemical  
16 agents, and Stingers to disorient or disable Fuller in order to safely  
17 enter the Apartment, assertions which Mrs. Storm has not disputed. See  
18 Dubois Decl., ECF No. [45](#) ¶ 7; Law Decl., ECF No. [48](#) ¶¶ 22-24.  
19 Accordingly, the Court finds that the Individual Defendants' use of force  
20 in executing the search warrant was not excessive, grants Defendants'  
21 motion in this regard, and denies Mrs. Storm's motion.

## 22 **ii. State Law Claims**

23 Mrs. Storm has also asserted claims for illegal search and excessive  
24 force under Article I § 7 of the Washington Constitution, common-law  
25 trespass and negligence claims, and a claim for wrongful damage to  
26 property under RCW 4.24.630. As stated on the record, the Court's ruling

1 on these motions is largely foreclosed by the discussion above. In the  
2 interest of clarity, the Court briefly recites the justifications for its  
3 rulings below.

4 Mrs. Storm's trespass claim fails because the officers were under  
5 "a duty or authority imposed or created by legislative enactment[, which]  
6 carries with it the privilege to enter land in the possession of another  
7 for the purpose of performing or exercising such duty or authority. . ."  
8 *Peters v. Vinatieri*, 102 Wn. App. 641, 655 (2000) (quoting RESTATEMENT  
9 (SECOND) OF TORTS § 211 (1965)). Here, the officers were acting within the  
10 authority granted them by virtue of their positions, and Mrs. Storm's  
11 trespass claim thus fails as a matter of law.

12 Mrs. Storm's negligence claim fails because under the "public duty  
13 doctrine," "no liability will attach for a public official's negligent  
14 conduct unless the plaintiff can show that the duty was owed to her  
15 rather than to the general public." *Donaldson v. City of Seattle*, 65 Wn.  
16 App. 661, 666 (1992) (citing *Taylor v. Stevens Cnty.*, 111 Wn.2d 159, 163  
17 (1988)). Here, because the officers were acting out of their duty to the  
18 public as a whole, Mrs. Storm's negligence claim fails as a matter of  
19 law.

20 Mrs. Storm's wrongful damage to property claim fails because the  
21 officers did not act "wrongfully," that is, they did not "intentionally  
22 and unreasonably commit[] the act or acts while knowing, or having reason  
23 to know, that he or she lack[ed] authorization to so act." RCW 4.24.630.  
24 Rather, as discussed above, the officers were justifiably relying upon  
25 a valid search warrant, and thus no liability attaches under RCW  
26 4.24.630.

1 Finally, while Washington's Fourth Amendment analogue in some areas  
2 provides greater protections than the federal constitution, Mrs. Storm's  
3 state constitutional claim fails under the state's more-stringent  
4 *Aguilar-Spinelli* test for informant reliability because, as discussed  
5 above, Officer Lee's affidavit would have established probable cause even  
6 without the information provided by Mr. Semmern.

7 For these reasons, as well as those stated on the record, the Court  
8 grants Defendants' motion with regard to each of Mrs. Storm's remaining  
9 state law claims.

### 10 **III. Conclusion**

11 For the reasons discussed above and at the hearing, **IT IS HEREBY**  
12 **ORDERED:**

13 1. Mrs. Storm's Cross Motion for Partial Summary Judgment on  
14 Probable Cause, **ECF No. 55**, is **DENIED**.

15 2. Defendants' Motion for Summary Judgment, **ECF No. 40**, is **GRANTED**.

16 3. All pending hearing and trial dates are **STRICKEN**.

17 4. Judgment shall be **ENTERED** in Defendants' favor with prejudice  
18 and this file shall be **CLOSED**.

19 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
20 this Order and provide copies to counsel.

21 **DATED** this 14<sup>th</sup> day of August 2012.

22  
23 S/ Edward F. Shea

EDWARD F. SHEA

24 Senior United States District Judge